

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1089

To be argued by
LAWRENCE IASON

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1089

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALAN GREGORY DAVID MARTIN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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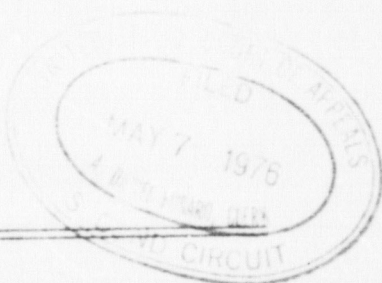


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ALAN GREGORY DAVID MARTIN,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement *

Alan Gregory David Martin appeals from a decision of the United States District Court for the Southern District of New York affirming a judgment of conviction entered after a trial on April 21, 1975 before the Honorable Gerard L. Goettel, United States Magistrate for the Southern District of New York.**

* References to the Trial Transcript will be designated Tr. and followed by the page number. References to the opinion of the Magistrate will be designated Op. followed by the page number.

** According to 18 U.S.C. § 3401:

"(a) When specifically designated to exercise such jurisdiction by the district court or courts he serves, and under such condition as may be imposed by the terms of the special designation, any United States magistrate shall have jurisdiction to try

[Footnote continued on following page]

Complaint 75-387, filed on March 10, 1975, charged the defendant Martin with assault by striking, beating or wounding, committed within the territorial jurisdiction of the United States, in violation of 18 U.S.C. § 113(d).^{*} The victim of the assault was Charles Francis Nergelovic, a hospital police officer at the Castle Point Veterans Administration Hospital, Castle Point, New York.

On June 17, 1975 Magistrate Goettel imposed a custodial sence of ninety days. Martin then sought review in the United States District Court for the Southern Dietrict of New York. After reviewing briefs filed by

persons accused of, and sentence persons convicted of, minor offenses committed within that judicial district.

* * * * *

"(f) As used in this section, the term "minor offenses" means misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than \$1000, or both [with stated exceptions not pertinent to this appeal.]"

Rule 35(b) of the General Rules of the United States District Court, Southern District of New York, provides that, "The court directs that the full time magistrates shall perform the duties referred to in 28 U.S.C. § 636(a). Every defendant charged with a minor offense as defined in 18 U.S.C. § 3401 shall in the first instance be brought before a full time magistrate who shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates as adopted by the Supreme Court of the United States on January 27, 1971."

^{*} 18 U.S.C. § 113 provides:

"Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

* * * * *

"(d) Assault by striking, beating, or wounding, by fine of not more than \$500 or imprisonment for not more than six month, or both."

The territorial jurisdiction of the United States is defined in 18 U.S.C. § 7(3). This element of the offense was stipulated to by the parties (Tr. 3-4).

the parties and after oral argument, the Honorable Whitman Knapp affirmed Martin's conviction without written opinion. The defendant is free on bail pending this appeal.

Statement of Facts

Pearl Merriweather, a nurse at the Castle Point Veterans Administration Hospital, testified that she was living with the defendant (Tr. 7-8). On March 7, 1975 Merriweather and Martin had an argument (Tr. 13). On March 8, 1975 Merriweather saw Martin in the basement of D building at the hospital around four o'clock (Tr. 13). Martin told Merriweather he had her car and would pick her up when she went off duty. Merriweather told Martin not to pick her up and went upstairs (Tr. 15).

When Merriweather was on the floor in Ward D-2, Martin again told her he would pick her up. Again Merriweather said no. Martin also told Merriweather to call the police officers off. He thought she had reported him for taking her car (Tr. 16-17).

Merriweather saw Martin again on Ward D-2. She saw something in Martin's hand which she thought was a knife (Tr. 18-19).

Charles Francis Nergelovic, a police officer at the Castle Point Veterans Administration Hospital for two and a half years, testified that at 4:15 on March 8, 1975 he was on duty at the hospital (Tr. 28). He received a call on his radio telling him that there was a white male in Ward D-2 who was brandishing an open knife (Tr. 28-29). Nergelovic left the police booth and went to Ward D-2 where he saw Pearl Merriweather (Tr. 30). Officer Newkirk also went to D-2 (Tr. 32).

When Officer Nergelovic went to D-2, he saw Martin and asked him whether he had a visitor's pass. Martin did not reply. Nergelovic asked Martin what his name was. Martin still did not reply. Nergelovic was wearing a uniform and identified himself as Officer Nergelovic. Nergelovic asked Martin whether he had a weapon, and Martin said, "that is for you to find out. Come and get me" and motioned with his fingers for Nergelovic to come to him. Nergelovic ordered Martin to position himself on the wall. Martin did nothing. Then Officer Newkirk arrived on the scene. Again Nergelovic ordered Martin to position himself on the wall, which Martin then did (Tr. 33-35, 59-60).

Newkirk then frisked Martin, and Nergelovic stood behind them and to Martin's right, five to seven feet away. While Newkirk was frisking him, Martin backed away from the wall. Nergelovic moved forward to help Newkirk put Martin back on the wall (Tr. 33-35, 43-44). Nergelovic tried to grab Martin to place him back on the wall but was unsuccessful because Martin was swinging his arms. Martin then moved back with his arm and struck Nergelovic in the neck and arm (Tr. 35, 43-45, 55).

Newkirk, Nergelovic and Martin all fell to the floor where they scuffled for about five minutes before Martin was subdued and handcuffed. Nergelovic told Martin he was under arrest for assault (Tr. 35, 49). Nergelovic took Martin to the medical admitting section and then to the police booth (Tr. 35-40).

Nergelovic testified that he received hardly any injury and that he did not miss any work. The blow did not cause him to bleed and did not cause any bruises (Tr. 50, 51, 53-54).

James Darcy, a patient at the hospital, testified that he saw Martin leaning against the wall and heard Martin tell one of the girls to get out of the way. He said he was there to see somebody, that he was going to see that person no matter what and nobody was going to push him out (Tr. 58).

Darcy heard Nergelovic ask Martin what he was doing, where his pass was and why he was in the hospital. Martin said he wanted to see Merriweather and that he was not leaving until he saw her (Tr. 58). Nergelovic identified himself as a federal officer and told Martin to be quiet and to leave (Tr. 59-60). Martin returned and said nobody was putting him out. When Newkirk came along, Nergelovic told Martin to turn around and put his hands against the wall. After Newkirk also told him to do so, Martin put his hands against the wall. While being frisked by Newkirk, Martin swung back and struck Nergelovic. Newkirk and Nergelovic each put an air lock on one of Martin's arms. Then the three of them fell to the floor, struggling. It took two minutes to put the cuffs on Martin (Tr. 60-61).

Darcy saw blood on Nergelovic's neck (Tr. 78).

ARGUMENT

The Magistrate made no error regarding the intent required for the crime charged.

The Magistrate made no error, as Martin claims, in his determination regarding the intent required for a conviction. On the contrary, the Magistrate properly reviewed the relevant case law and correctly applied it to the facts in this case.

Martin claims that intent to cause injury is an element of the offense and that the Magistrate failed

to determine whether the Government had proved this element beyond a reasonable doubt. The Magistrate explicitly found that Martin had the intent to commit the crime charged, whether that intent was described as general intent or specific intent. In the relevant portion of his opinion Judge Goettel wrote:

"Considering the defendant's actions, it is clear that he had the requisite general intent for a violation of § 113(d). He swung at and missed Officer Newkirk. (That, in itself, would be a violation of § 113(e), the lesser included offense.) Then, after striking Officer Nergelovic, he began to 'scuffle' with both officers. Even if a specific intent were required, it is a reasonable inference from this behavior that defendant intended an assault. As a matter of general intent, it was reasonably foreseeable that, by swinging around with upraised arms, defendant would strike one of the officers. The fact that the motive for the assault was to resist a search of his person would not make it any less an assault." [Footnote omitted] [Op. 4-5.]

It is clear that Judge Goettel found that Martin intended an assault, that this finding is supported by the evidence and that this is the only mental element required for a conviction under 18 U.S.C. § 113(d).

There is no dispute that Martin struck Officer Nergelovic in the arm and in the neck. Magistrate Goettel concluded that Martin "intended an assault." (Op. 4). The evidence clearly supports this conclusion. Martin came to the hospital looking for Merriweather. They had had an argument. They met at the hospital and had a dispute when Martin said he would pick Merriweather up when she went off duty. Merriweather saw what she thought was a knife in Martin's hand.

A patient, James Darcy, heard Martin tell one of the girls to get out of the way and say he was there to see somebody no matter what, and nobody was going to push him out.

Officer Nergelovic responded, along with Officer Newkirk, to the call that a man on Ward D-2 was brandishing an open knife. Martin made no reply to Officer Nergelovic's first two questions. When Nergelovic asked whether he had a weapon, Martin said, "That is for you to find out. Come and get me," and motioned for Nergelovic to come to him. Nergelovic told Martin to position himself on the wall, but Martin refused until Newkirk arrived to help Nergelovic. Then, while Newkirk was frisking him, Martin backed away from the wall, swinging his arms. Martin struck Nergelovic in the neck and arm. After that Nergelovic and Newkirk scuffled with Martin for two to five minutes before they subdued him.

From all these circumstances there can be no dispute that Martin assaulted Nergelovic nor that he intended to assault him. This is the inevitable conclusion that must be drawn from Martin's actions, starting with his conversations with Merriweather, his refusal to answer Nergelovic's questions, his statement that Nergelovic should come and get him and culminating in the assault on Nergelovic. Martin clearly intended to commit the acts proscribed by 18 U.S.C. § 113(d). That intent is sufficient for a violation of the statute.

Martin's argument that intent to cause injury is required for a conviction under 18 U.S.C. § 113(d) is contradicted by the statute itself. Although 18 U.S.C. § 113(c), the offense one degree more serious than section 113(d), explicitly requires "intent to do bodily harm," no intent is specified in section 113(d). As Judge

Goettel pointed out in his opinion, the fact that no intent was specified in 18 U.S.C. § 113(d), although intent was specified in the three preceding subsections of section 113, is evidence that Congress intended that section 113(d) would be satisfied by proof of a general intent to strike, beat or wound. That test clearly was met in this case, as Judge Goettel found.

Indeed Martin's argument is so frivolous that the question of intent under 18 U.S.C. § 113(d) has been considered in only one reported decision, *United States v. Salazar*, 505 F.2d 72, 74-75 (8th Cir. 1974). In concluding that there was sufficient evidence of intent to support a conviction under 18 U.S.C. § 113(d), the Eighth Circuit did not state explicitly what intent was required under the statute, but the only inference to be drawn is that a general intent is sufficient. Salazar was a prison inmate who had undergone knee surgery and demanded medication to alleviate his pain. When the nurse and the officer on duty told Salazar that prison regulations prevented them from providing him with the medication he sought, he became violent, called the nurse a "damn bitch" and struck her in the stomach. In a concurring opinion, Judge Bright wrote that although he would acquit if he had been the factfinder because the extenuating circumstances of Salazar's pain caused Judge Bright to doubt whether the blow was intentional, he agreed that there was sufficient evidence to affirm the conviction. 505 F.2d at 75-76. Both the majority and concurring opinions suggest that intent to commit the assault is sufficient under Section 113(d).

Martin's situation, however, raises no question of extenuating circumstances comparable to Salazar's claim, and the evidence of Martin's criminal intent is greater than the evidence of intent in *Salazar*. As Judge Bright pointed out, this is a question for the factfinder. Judge

Goettel's conclusion that Martin possessed the requisite intent is clearly supported by sufficient evidence.

If we look at cases decided under the more serious felony provisions of 18 U.S.C. § 111 for assault on specified federal officers, we see that a general intent to commit the acts without any intent to cause injury is sufficient even though a conviction under that statute, unlike 18 U.S.C. § 113(d), is punishable as a felony.

In *United States v. Feola*, 420 U.S. 671, 686 (1975), the Supreme Court said "We hold, therefore, that in order to incur criminal liability under § 111 an actor must entertain merely the criminal intent to do the acts therein specified." In *Feola* the Supreme Court reversed that portion of a decision of this Court in which it in turn had reversed the conviction for conspiracy to violate 18 U.S.C. § 111. In affirming the substantive conviction for violating 18 U.S.C. § 111, a decision not presented to the Supreme Court, this Court noted that the defendant merely "lifted his hand menacingly, as though to shove Lightcap, and did in fact shove him—both acts sufficient to constitute a crime under section 111. See, e.g. *United States v. Bamberger*, 452 F.2d 696, 699 (2d Cir. 1971), cert. denied, 405 U.S. 1043, 92 S. Ct. 1326, 31 L.Ed. 2d 585 (1972)." *United States v. Alsondo*, 486 F.2d 1339, 1345 (2d Cir. 1973), reversed on other grounds *sub nom. United States v. Feola*, 420 U.S. 671 (1975). *Bamberger* and *Alsondo* are the definitive decisions in this Circuit construing assault under the federal law. Although they were decided under 18 U.S.C. § 111, the opinions in those cases establish the definition of assault for the purposes of this case.

In *Bamberger* the Court focused on the use of the word "forcibly" in 18 U.S.C. § 111. "Forcibly" of course is not found in 18 U.S.C. § 113(d). Its absence and the fact that 18 U.S.C. § 113(d) is a petty offense punishable

by imprisonment for not more than six months must be contrasted with the fact that 18 U.S.C. § 111 is a felony with a maximum punishment of three years.* Since an "incidental touching" is sufficient under § 111, a wilful striking must be sufficient for a conviction of Martin under § 113(d).

Appellant Martin suggested at the trial that for purposes of this case the definition of assault under the New York statute should apply. As the Court made clear in *United States v. Anderson*, 425 F.2d 330 (7th Cir. 1970), there is no basis for this position. The Assimilative Crimes Act, 18 U.S.C. § 13, explicitly makes state law applicable only if the act of omission is "not made punishable by an enactment of Congress." 425 F.2d at 332. The offense with which Martin is charged was made punishable by Congress through 18 U.S.C. § 113(d), and section 13 therefore cannot apply.** See also *Hockenberry v. United States*, 422 F.2d 171 (9th Cir. 1970); *United States v. Patmore*, 475 F.2d 752 (10th Cir. 1973). As a result the definitions of assault in New York State and in Black's Law Dictionary are irrelevant to this case, and the federal definition articulated in *Alsondo* and *Bamberger* is controlling.

There was no dispute at the trial that defendant Martin struck Officer Nergelovic. This striking was an assault under 18 U.S.C. § 113(d), irrespective of whether Officer Nergelovic suffered any lasting injury. Whether the intent is described as general or specific, the evidence of Martin's intent was more than adequate to prove his guilt beyond a reasonable doubt, and the trier of facts so found.

* There is a ten year maximum under § 111 if a deadly or dangerous weapon is used.

** At the trial it was stipulated that the acts in question occurred within the territorial jurisdiction of the United States. 18 U.S.C. § 7(3) (Tr. 3-4).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING -

State of New York)
County of New York)

LAWRENCE IASON being duly sworn
deposes and says that he is employed in the office of
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New York.

Stating also that on the 7th day of May, 1976
he served a copy of the within brief for the
United States
by placing the same in a properly postpaid franked envelope
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Lawrence Iason
LAWRENCE IASON

Sworn to before me this

7th day of May, 1976

Gloria Calabrese

GLORIA CALABRESE
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No. 24-0535340
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